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In the Supreme Court of the United States

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OCTOBER TERM, 1952

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

vs.

THOMAS W. DANT, ET AL., Copartners, DBA DANT & RUSSELL, LTD.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Amici Curiae

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Brief of Amici Curiae

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I. AUTHORITY FOR SUBMISSION OF THIS BRIEF—INTEREST OF AMICI CURIAE

This brief is submitted under the authority of Section 9(a) of Supreme Court Rule 27, 28 U.S.C., all parties to this case having given their consent thereto in writing.

Each of these amici curiae is at present a party to a judicial or National Labor Relations Board (hereinafter referred to as the "Board") proceeding involving the precise issue which is before this Court herein. The status of their respective cases is as follows:

1. **THE AMERICAN THREAD COMPANY, Tallapoosa, Georgia.**

On July 31, 1952, the United States Court of Appeals for the Fifth Circuit denied the Board's petition for enforcement in a case against this Company and set aside the Board's order. *National Labor Relations Board v. The American Thread Company,* 198 F.(2d) 137. Counsel for The American Thread Company has received a notice from the Solicitor General's office to the effect that the Solicitor General intends to file a petition for certiorari in this case and that the Solicitor General has obtained from Mr. Justice Black an order extending to November 21, 1952, the time within which so to petition for certiorari.

2. **NINA DYE WORKS CO., INC., York, Pennsylvania.**

On July 24, 1952, the United States Court of Appeals for the Third Circuit denied the Board's petition for enforcement in a case against this Company and set aside the Board's order, *National Labor Relations Board v. Nina Dye Works Co., Inc.,* 198 F.(2d) 362. On October 16, 1952, Mr. Justice Burton granted the Board an extension of time to November 21, 1952, within which to file a petition for certiorari.

3. **JACK SMITH BEVERAGES, INC., Jackson, Michigan.**

A case against this Company is presently pending in the United States Court of Appeals for the Sixth Circuit on a petition for enforcement of the Board's order. *National Labor Relations Board v. Jack Smith Beverages, Inc.,* Case No. 11493. The case has been submitted to the said court, oral argument therein having been had on October 9, 1952.

4. EDWARDS BROTHERS, INC., Ann Arbor, Michigan.

A case against this Company is presently pending in the United States Court of Appeals for the Sixth Circuit on a petition for enforcement of the Board's order. *National Labor Relations Board v. Edwards Brothers, Inc.*, Case No. 11635. The Record in the case is ready for printing but by stipulation between the attorneys for Edwards Brothers, Inc. and the General Counsel of the Board (hereinafter referred to as the "General Counsel"), the printing is being deferred pending a decision by the said court in *National Labor Relations Board v. Jack Smith Beverages, Inc.*, supra, page 2.

5. RUBIN BROTHERS FOOTWEAR, INC., Waycross, Georgia.

A case against this Company is presently pending in the United States Court of Appeals for the Fifth Circuit on a petition by Rubin Brothers to review an enforcement order of the Board and a cross petition by the Board for enforcement of its order. *National Labor Relations Board v. Rubin Brothers Footwear, Inc., et al.* Oral argument is scheduled before the said court in this case for about January 1, 1953.

6. I.B.S. MANUFACTURING COMPANY, New Albany, Mississippi.

A proceeding against this Company is presently pending before the Board. *I.B.S. Manufacturing Company, et al.*, Case No. 32-CA-71. A decision and order against the said Company were issued by the Board on November 2, 1951 (96 N.L.R.B. No. 200), but the Company has refused to comply with the Board's order. No petition for enforcement by the Board has been filed.

7. MAGEE CARPET COMPANY, Bloomsburg, Pennsylvania.

A proceeding against this Company is presently pending before the Board. *Magee Carpet Company,* Case No. 4-CA-178. The Board's initial complaint in this case was dismissed by the Board following this Court's decision in *National Labor Relations Board v. Highland Park Manufacturing Company* (1951), 341 U.S. 322, and also following the remand of Magee Carpet Company's case to the Board, on the Board's motion, from the United States Court of Appeals for the Third Circuit, where the case had been pending on the Board's petition for enforcement. *National Labor Relations Board v. Magee Carpet Company* (1951), 189 F.(2d) 259. The Board thereafter issued a second complaint and the Company moved to dismiss. The Board denied such motion on July 29, 1952, and the Company has filed with the Board a Petition for Reconsideration of such denial, which petition is presently pending before the Board.

8. SHELL CHEMICAL CORPORATION, Martinez, California.

A proceeding against this Company is presently pending before the Board. *Shell Chemical Corporation,* Case No. 20-CA-151. The initial complaint by the Board in this case was dismissed by the Board following this Court's decision in the *Highland Park* case, supra. Thereafter, the Board issued a second complaint and the Company moved to dismiss. The Board denied such motion on July 29, 1952, and there is presently pending before the Board a Motion for Reconsideration—Stay of Proceedings, filed by the Company, addressed to such denial of the Company's motion.

II. HISTORY OF THE CASE—OPINIONS BELOW

This matter arises upon a writ of certiorari issued by this Court, on the petition of the Board, to the United States Court of Appeals for the Ninth Circuit to review the decision of that court in the case of *National Labor Relations Board v. Dant, et al.* (1952), 195 F.(2d) 299. The Court of Appeals set aside an order issued by the Board, 92 N.L.R.B. 307 (motion for reconsideration denied, 95 N.L.R.B. No. 44), against Thomas W. Dant, et al., a copartnership doing business as Dant & Russell, Ltd. (hereinafter referred to as the "Respondent"), pursuant to a complaint issued by the General Counsel on March 27, 1950. The charge upon which the complaint was predicated was filed by the International Woodworkers of America, Local 6-7, C.I.O. (hereinafter referred to as the "Union"), on August 3, 1949.

The Congress of Industrial Organizations (hereinafter referred to as the "C.I.O."), a labor organization with which the Union was at all material times affiliated, did not comply with the filing requirements of Sections 9(f), (g) and (h)[1] of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. (Supp. III) § 141, et seq. (hereinafter referred to as the "Act"), until December 22, 1949.[2] Consequently, the

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[1]The texts of these Sections and other relevant Sections of the Act are set out in the Appendix hereof. References, unless otherwise noted, are to the Act as effective at the time the charge herein was filed.

[2]These amici curiae request this Court to take judicial notice of this fact, which is shown, for example, by General Counsel's Exhibit 14, received in evidence in the matter of *Shell Chemical Corporation and Oil Workers International Union, C.I.O., Local No. 5*, supra, page 4, now pending before the Board and involving the issue of this case, wherein the General Counsel has so stipulated as follows:

> "The Congress of Industrial Organizations, a labor organization of which the Union was at all times material herein

Union was not in compliance at the time it filed the charge. *National Labor Relations Board v. Highland Park Manufacturing Company*, supra, page 4. The Court of Appeals held that under these circumstances the Board was without authority to entertain the charge or to issue a complaint or order pursuant thereto, and, accordingly, set the Board's order aside.

III. THE ISSUE AND POSITION OF AMICI CURIAE WITH RESPECT THERETO

The question presented herein is whether the Board's order against the Respondent, predicated on a complaint issued by the General Counsel pursuant to a charge filed by the Union at a time when it was not in compliance with the filing requirements of Section 9(h)[3] of the Act, was valid where the Union came into compliance prior to the time of the issuance of the complaint. These amici curiae take the position that such charge was without any effect or validity whatsoever, that the General Counsel had no authority to issue a complaint based thereon, and that the order issued by the Board on the basis of such a complaint was a nullity and was properly set aside by the Court of Appeals.

IV. SUMMARY OF ARGUMENT

A. Sections 9(f), (g) and (h) of the Act establish certain requirements with which a labor organization and all of its constituent and affiliated units must comply. The Union

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an affiliate or constituent unit, for the first time achieved compliance with the requirements of Section 9(f), (g) and (h) of the National Labor Relations Act, as amended, hereinafter called the Act, on December 22, 1949, and has remained in compliance therewith at all times thereafter."

[3] The Union also was not in compliance with Sections 9(f) and (g) of the Act, supra, Note 2, page 5.

was not in compliance with these Sections when it filed the charge herein. These amici curiae will show from an examination of the language of the Act, the legislative history thereof, the Rules and Regulations and Statements of Procedure of the Board and the interpretation thereof by the General Counsel, and relevant judicial decisions that the charge filed by the Union was, therefore, wholly without effect, and that the complaint and order issued pursuant to such charge are invalid.

B. Further, whatever the requirements of the Act may be, the Rules and Regulations and Statements of Procedure promulgated by the Board require compliance with the filing requirements of the Act as a condition precedent to the filing by a union of an unfair labor practice charge. Consequently, the entertaining of the charge filed by the noncomplying Union and the issuance of the complaint and order pursuant thereto, in contravening the Board's established procedure of dismissing such a charge, has resulted in a violation of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. § 1001, et seq., and the Board has thus exceeded its jurisdiction. The complaint and order issued pursuant to such charge are therefore invalid.

C. Finally, since the Rules and Regulations and Statements of Procedure promulgated by the Board and the practices followed by the General Counsel thereunder require compliance with the filing requirements of the Act as a condition precedent to the filing by a union of an unfair labor practice charge, the entertaining of the charge filed by the noncomplying Union and the issuance of the complaint and order pursuant thereto, in contravening the Board's established procedure and practice of dismissing such a charge, has resulted in a discrimination against the Re-

spondent in violation of the Fifth Amendment of the United States Constitution, and the Board has thus exceeded its jurisdiction. The complaint and order issued pursuant to such charge are therefore invalid.

V. ARGUMENT

A. The Complaint and Order Issued Against the Respondent Are Invalid Since No Valid Charge Has Ever Been Filed Herein.

1. THE FILING OF A CHARGE IS A CONDITION PRECEDENT TO BOARD ACTION.

It is well established that the Board lacks jurisdiction to issue a complaint or order with respect to alleged unfair labor practices unless a valid charge has been filed. *National Labor Relations Board v. Indiana and Michigan Electric Company* (1943), 318 U.S. 9; *National Labor Relations Board v. Kobritz* (1st Cir., 1951), 193 F.(2d) 8; *Consumers Power Company v. National Labor Relations Board* (6th Cir., 1940), 113 F.(2d) 38. Accordingly, the complaint and order herein are invalid unless they were issued pursuant to a valid charge.

2. SECTIONS 9(f), (g) AND (h) OF THE ACT PROHIBIT THE FILING OF CHARGES BY NONCOMPLYING UNIONS.

While the charge which initiated this proceeding was filed on August 3, 1949, the charging Union did not, until December 22, 1949, come into compliance with the filing requirements of Sections 9(f), (g) and (h) of the Act, all of which have a common legislative history, were intended to have the same consequences and should be construed together. It is submitted for the reasons hereinafter set forth that this noncompliance status of the charging Union at the time the charge was filed prevented the charge from being valid for any purpose and that, therefore, the order issued by the Board pursuant to the complaint predicated on such charge was properly set aside by the Court of Appeals.

a. The Language of the Act Requires Compliance as a Prerequisite to the Filing of a Charge.

Section 9(f) of the Act requires the filing by all labor organizations and their affiliate and constituent units of certain data relative to the organization and financial affairs of the union. Section 9(g) requires that the material filed under 9(f) be kept current and furnished annually to members of the union. Section 9(h) requires that non-Communist affidavits be filed and kept current.

The operative language of these Sections relating to unfair labor practices is as follows:

9(f):

> "... no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have *prior thereto filed* [certain material] and (B) can show that *prior thereto* it has *performed* [certain acts]."

9(g):

> "... no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit *has complied with its obligation* under this subsection."

9(h):

> "... no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10 unless there is *on file* with the Board an affidavit *executed contemporaneously* or within the preceding twelve-month period by each officer ..." (Emphasis added.)

The only reasonable meaning that can be drawn from the language of these Sections is that, in order for a charge to be valid, compliance of the charging union must be effectuated not later than the time of filing the charge. That such was clearly the intention of Congress, if any uncertainty can be found in these Sections, will be conclusively demonstrated by the consideration of the legislative history of these Sections hereinafter set forth. Considering the language of the Act itself, however, to interpret "prior thereto", "has complied" and "contemporaneously" in Sections 9(f), (g) and (h), respectively, as relating to the time of filing the charge establishes a logical and understandable construction of these Sections, while to interpret these phrases as relating to the time of issuance of the complaint produces a wholly impractical and unlikely construction. Adoption of the latter construction would result in a prodigal waste of the efforts and resources of the Board in the investigation of charges filed by noncomplying unions, regardless of the statutory prohibition against issuing a complaint on the basis of such charges so long as the status of noncompliance of the charging union continues. Adoption of the former interpretation, on the other hand, eliminates this consequence.

Efforts to apply the interpretation here contended for by the Board to the language used by Congress in these Sections result in further incongruities. For example, to interpret "contemporaneously" in Section 9(h) as relating to the time of issuance of the complaint would make the Section internally inconsistent, for it would then contain an authorization that the affidavits be executed "contemporaneously" with the issuance of the complaint and the clearly inconsistent requirement that the affidavits already be "on

file" at the time of the issuance of the complaint. Furthermore, unless the word "contemporaneously" is read out of the Act, this interpretation would authorize the execution of the affidavits at the time of issuance of the complaint and thus would envisage some such unrealistic procedure of finally effectuating compliance as by the foregathering at a designated place, pursuant to a prearranged plan, of the officers of the noncomplying labor organization and a representative of the General Counsel, with a fully prepared complaint in his possession; for execution by the union officers of the required affidavits contemporaneously with the issuance by the General Counsel of the complaint. Surely Congress, in enacting Section 9(h), did not contemplate such an arrangement.

It is submitted, therefore, that the only reasonable interpretation of the language of the Act is that compliance with Sections 9(f), (g) and (h) is a prerequisite to the filing of a charge, as the Court of Appeals concluded.

b. It Was the Congressional Intent That Compliance Be a Prerequisite to the Filing of a Charge.

The legislative history of Sections 9(f), (g) and (h) of the Act removes any possible doubt that compliance was intended to be a prerequisite to the filing of a charge. With specific reference to the requirements of Sections 9(f) and (g), *House Conference Report No. 510 on H. R. 3020*, 80 Cong., 1st Sess., embracing the text of the Labor Management Relations Act, 1947 (hereinafter referred to as the "Taft-Hartley Act"), was submitted to the House by Congressman Hartley, co-author of the last mentioned Act, and

reported on the outcome of the conference between the Senate and House committees. It contained the following:

> "The conference agreement (sec. 9(f) and (g)) adopts the provisions of the Senate amendment with three changes therein. First, the filing of the information and reports is made a condition of eligibility for requesting a union shop election, *in addition to* eligibility for filing petitions for representation and *eligibility for making charges.* Second, it is provided that not only the particular labor organization *invoking the processes of the act,* but also any national or international labor organization of which it is an affiliate or constituent unit, must file the required information and reports. Third, there are added to the matters with respect to which information must be filed, detailed statements of, or reference to, the provisions of the organization's constitution and bylaws, etc." (Emphasis added.) Bureau of National Affairs, Inc., *The New Labor Law* (1947), p. B-22.

The earlier declarations of the co-authors of the Taft-Hartley Act in the course of Congressional debate thereon were consistently to the same effect. On at least two prior occasions Senator Taft unequivocally explained the nature of the compliance requirement of Section 9(f):

On April 23, 1947, he made the following statement pertaining to 9(f) at 93 Cong. Rec. 3955:[4]

> "Mr. President, the bill provides that unions must file financial reports on forms certified by the Secretary of Labor, and furnish the reports to all their members, and file a copy with the Secretary of Labor . . . .
> *The filing of such report* is a condition of certification

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[4]See also remarks to same effect of Senator Murray, 93 Cong. Rec. 4156 and Senator Thomas, 93 Cong. Rec. 4897.

as a bargaining agent under the law, and *is also a condition of the right to file any charges under the National Labor Relations Act.*" (Emphasis added.)

On June 5, 1947, Senator Taft caused a written analysis relative to various provisions of the Act to be printed in the Congressional Record. The comments therein concerning Sections 9(f) and (g) read as follows (93 Cong. Rec. 6602):

> "Subsection 9(f) and subsection 9(g), requiring [that] labor organizations *as a condition precedent to* being recognized as representatives under section 9 or *being permitted to file charges* under section 10 must file certain information with the Secretary of Labor and furnish certain financial reports to their members, differs from the corresponding subsections in the Senate amendment only with respect to [9](f)(6)." (Emphasis added.)

It is obvious from the similarity of language and purpose that the consequences of failure to comply with Section 9(h), which was drafted subsequent to Sections 9(f) and (g) and in the light of the legislative history thereof, were intended to be identical to the consequences of failure to comply with Sections 9(f) and (g). That Congress intended compliance with 9(h) to be a condition precedent to the capacity of a labor organization to file an unfair labor practice charge is also illustrated by the following legislative declarations by the co-authors of the Taft-Hartley Act:

On June 4, 1947, Congressman Hartley clearly explained that the purpose of Section 9(h) was to deny access to the Board to noncomplying unions, 93 Cong. Rec. 6540:

> "The bill further *prohibits labor organizations from invoking the processes of the act* unless all of the offi-

cers file affidavits with the board that they are not members of the Communist Party or other subversive organizations." (Emphasis added.)

On June 12, 1947, Senator Taft described the effect of Section 9(h), 93 Cong. Rec. 7002, as follows:

"This provision making the filing of affidavits with respect to Communist Party affiliation by its officers *a condition precedent to use of the processes of the Board* has been criticized as creating endless delays." (Emphasis added.)

It is submitted therefore that compliance with the requirements of Sections 9(f), (g) and (h) of the Act is clearly established by the legislative history of the Act as a prerequisite to the filing of a valid charge by a labor organization.

c. The Board and the General Counsel Have, by Their Regulations, Procedures and Administrative Practices, Recognized That the Validity of a Charge Is Dependent upon Compliance at the Time of Filing the Charge.

From the inception of the Taft-Hartley Act, the Board's administrative regulations and practices thereunder have consistently required compliance with Sections 9(f), (g) and (h) of the Act as of the time a charge is filed. Section 203.13(b) of its Rules and Regulations, Series 5, effective August 23, 1947, and Section 202.3 of its Statements of Procedure, also effective August 23, 1947, first promulgated under the Act, provided as follows:

"203.13 *Compliance with Section 9(f), (g) and (h) of the Act:*

* * * * * * *

(b) For the purpose of these rules and regulations, compliance with section 9(h) of the act means that a national and an international labor organization has on

file with the General Counsel in Washington, D. C., and a local labor organization has on file with the Regional Director in the region in which the proceeding is pending:

(1) *An affidavit* by an authorized representative of the labor organization, under oath, *executed contemporaneously with the charge* or within the preceding 12-month period, listing the titles of all offices . . .

(2) *An affidavit* by each officer referred to in paragraph (1) of this paragraph, *executed contemporaneously with the charge* or within the preceding 12-month period, stating that he is not a member of the Communist party . . ." (Emphasis added.)

"202.3 *Compliance with Section 9(f), (g) and (h) of the Act:*

If the charge is filed by a labor organization, that labor organization must present either *with the charge* or within a reasonable period not to exceed 10 days thereafter[5] (evidence of compliance with 9(f) and (g)). In addition the labor organization and every national or international labor organization of which it is an affiliate or constituent unit must have complied with section 9(h) of the act by filing with the General Counsel of the Board in Washington, D. C., either *with the charge* or within a reasonable period not to exceed 10 days thereafter . . ." (Emphasis added.)

Substantially identical language has appeared in the Board's Rules and Regulations and Statements of Procedure at all

[5]These amici curiae do not, however, concede the validity of the ten-day "grace period" which the Board has thus established in its Statements of Procedure, without authority under the Act, and which is adverted to elsewhere in this brief.

times since the adoption of the foregoing, and now comprises Section 102.13 of Rules and Regulations, Series 6, effective March 1, 1951, and Section 101.3 of Statements of Procedure, also effective March 1, 1951, respectively.

Furthermore, the Board has published a booklet entitled "A Guide for Labor Organizations", of which these amici curiae request this Court to take judicial notice, which describes the steps necessary for a union to come into compliance and remain in compliance with Section 9(h). It also describes the consequences which attach when a complying union fails to properly renew its affidavits upon the election of new officers or within a ten-day period of grace thereafter,[6] as follows (page 11):

> "At the end of this 10-day period, if affidavits have not been received, all matters pending before the Board involving your organization will be subject to immediate dismissal without further notice."

Clearly the same consequences attach to a failure to execute the necessary affidavits in the first instance.

Under these clear rules of procedure the General Counsel has uniformly dismissed charges filed by noncomplying unions where compliance has not been effectuated within the ten-day period following the filing of the charge, or at the expiration of an extension of time granted upon petition by a charging union which demonstrates that it is making a good faith effort to come into compliance.[7]

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[6]See Note 5, supra, page 15.

[7]These amici curiae request this Court to take judicial notice of these procedures as shown, for example, by General Counsel's Ex-

In view of the foregoing, it is manifest that the Board and the General Counsel have, by their regulations, procedures and administrative practices, recognized that the validity of a charge is dependent upon compliance at the time of filing the charge.

d. It Has Been Judicially Determined That Compliance Is a Prerequisite to the Filing of a Charge.

Prior to the erroneous decision of the Board in *Northern Virginia Broadcasters, Inc.*, 75 N.L.R.B. 11, the General Counsel correctly took the position that the C.I.O. was a "labor organization" within the meaning of Sections 9(f), (g) and (h) of the Act. Charges filed by its affiliates were

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hibit 14 received in evidence in the *Shell Chemical* case, supra, page 4, wherein the General Counsel has so stipulated as follows:

> "At all times material herein, from on or about August 22, 1947, up to and including the date hereof [May 12, 1952], the procedure of the General Counsel concerning compliance with the requirements of Section 9(f), (g) and (h) of the Act on the part of labor organizations in filing charges has been as follows:
>
> When a charge was filed by a labor organization not in compliance, the Regional Director gave notice that the charge would be dismissed unless the labor organization had attained compliance within ten days. If the labor organization had not come into compliance within that period, and had not been granted by the Regional Director an extension of time, for good cause shown, within which to comply, the Regional Director would notify the labor organization that he was refusing to take further action for that reason, and the case thereafter was closed, subject to right of appeal to the General Counsel within ten days. A union which had filed a charge and was seeking to complete its compliance might apply for an extension of time within which to comply, and upon a showing of good cause, the Regional Director might grant such an extension."

therefore dismissed for noncompliance.[8] However, in the *Northern Virginia Broadcasters* case the Board held that such organizations as the C.I.O. were not "labor organizations" within the meaning of those Sections. Thereafter, a large number of charges filed by C.I.O. affiliates were processed, although the parent organization did not come into compliance until a much later date.

On May 14, 1951, this Court, in the *Highland Park* case, supra, page 4, overruled the position which the Board had taken in its *Northern Virginia Broadcasters* decision. It held that the C.I.O. was a labor organization within the meaning of the Act and that, since it was not in compliance with Section 9(h) during the pertinent period, its affiliate, the Textile Workers Union of America, was not in compliance. It further held that the order to bargain issued by the Board was invalid, notwithstanding the fact of compliance by the C.I.O. after the issuance of the complaint. As a result of the *Highland Park* decision, the Board dismissed complaints pending before it which had been issued, prior to compliance by the C.I.O., pursuant to charges filed by C.I.O. affiliates during the period of noncompliance.

The Board's issuance, however, after compliance by the C.I.O., of complaints predicated on charges filed by C.I.O. affiliates prior to the time of compliance, led inevitably to judicial determinations as to whether charges filed by noncomplying unions were valid. This question has now been expressly ruled upon in three judicial decisions, all clearly holding that charges so filed are invalid and that complaints and orders issued pursuant thereto are also consequently in-

[8] See Note 7, supra, page 16.

valid. *National Labor Relations Board v. Nina Dye Works Co., Inc.*, supra, page 2; *National Labor Relations Board v. The American Thread Company*, supra, page 2, and the decision herein of the Court of Appeals. These cases are fully considered in the brief of the Respondent in opposition to the petition for writ of certiorari granted herein. It is sufficient here to say that the three Courts of Appeals which have specifically considered this question have been unanimous in sustaining the position argued by these amici curiae. Indeed, these amici curiae further believe that this position is fully sustained by this Court's decision in the *Highland Park* case, which is also discussed at length in the Respondent's brief.

It is difficult to perceive, in the light of all the relevant considerations discussed above and the policies of the Act, how the Courts of Appeals could have come to any other conclusion. The well-defined purpose of Sections 9(f), (g) and (h) of the Act is to eliminate certain abuses in the labor movement by denying the processes of the Board to noncomplying unions. This is particularly exemplified by Section 9(h), the objective of which is to exclude members of the Communist Party from offices in labor organizations by denying the processes of the Board to noncomplying unions. Mr. Justice Frankfurter very aptly described this policy in his concurring opinion in *American Communications Association v. Douds* (1950), 339 U.S. 382, at 416-418, in which he stated:

> "The central problem presented by the enactment now challenged is the power of Congress, as part of its comprehensive scheme for industrial peace, to keep Communists out of controlling positions in labor unions *as a condition to utilizing the opportunities afforded by the National Labor Relations Act*, as amended by the Labor Management Relations Act, 1947

> . . . The essential question now is whether Congress may determine that membership of union officers in the Communist Party creates such an obvious hazard to the peace promoting purposes of the Act that *access to the machinery of the Act may be denied unions* which prefer their freedom to have officers who are Communists to their opportunities under the Act . . . It must suffice for me to say that the judgment of Congress that trade unions which are guided by officers who are committed by ties of membership to the Communist Party *must forego the advantages of the Labor Management Relations Act* is reasonably related to the accomplishment of the purposes which Congress constitutionally had a right to pursue." (Emphasis added.)

Similarly, the United States Court of Appeals for the Fifth Circuit in *National Labor Relations Board v. Postex Cotton Mills* (1950), 181 F.(2d) 919 at 919-920, said at a later date:

> "There is no dispute between the parties as to Congressional purpose. It is conceded that the evil of Communist influence upon labor organizations was sought to be remedied by *denying the benefits provided by the Act*, and especially collective bargaining, to unions having Communist officers . . . We think the language of the statute, considered in the light of Congressional purpose, the evil to be remedied, and the means provided to effectuate that purpose, evidences Congressional intent to wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist party and believers in the unconstitutional overthrow of our Government." (Emphasis added.)

The latter part of this language was quoted with approval by this Court in the *Highland Park* case at page 325.

If the Act were to be construed to authorize the Board to entertain a charge filed by a noncomplying union, as the Board here contends, then the policies underlying Section 9(h), as well as those underlying Sections 9(f) and (g), would be defeated. The processes of the Board, rather than becoming wholly unavailable at the end of the six-month limitation period of Section 10(b) of the Act, would remain in abeyance indefinitely to be called into action at such time as the union saw fit to comply.[9]

In addition to the three decisions noted above involving the specific issue of this case, numerous other cases involving the question of the consequences of noncompliance have confirmed that noncomplying unions are not entitled to invoke the power of the Board in any way. The United States Court of Appeals for the Fourth Circuit said in *N.L.R.B. v. Highland Park Manufacturing Co.* (1950), 184 F.(2d) 98 at 99, affirmed, *National Labor Relations Board v. Highland Park Manufacturing Co.*, supra, page 4:

> "We find no ambiguity in the language of the governing statute. On the contrary it provides as clearly as language can that *the power of the Board may not be invoked by a labor organization unless there is on file the affidavits which the statute requires . . .*" (Emphasis added.)

The United States Court of Appeals for the Fifth Circuit in *National Labor Relations Board v. Postex Mills*, supra, page 20, said at 922:

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[9]Thus, as has in fact occurred in the *Shell Chemical* case, supra, page 4, the acts complained of allegedly occurred on September 7, 1948, the charge was filed on November 17, 1948, the charging union came into compliance on December 22, 1949, and the pending complaint was issued on February 6, 1952.

"The provision is pertinent though, as illustrative that Sec. 9(h) evidences no novelty in expression of congressional intent to prevent any governmental department *from being used directly or indirectly*, to promote or sustain any organization or person who believes in the overthrow of the government of the United States by any unconstitutional means." (Emphasis added.)

In *West Texas Utilities Co. v. National Labor Relations Board* (1950), 184 F.(2d) 233, cert. den. (1951) 341 U.S. 939, petition for rehearing denied (1951) 342 U.S. 843, the United States Court of Appeals for the District of Columbia said, at 239:

"The Act's only sanction for non-compliance is *denial of Board facilities.* Thus, if an unfair labor practice is committed by an employer, the union may not seek Board aid to compel him to cease and desist

'unless there is on file with the Board an affidavit executed *contemporaneously or within the preceding twelve-month period*'

by the officers covered. Since this language specifically contemplates that the requisite affidavits may be filed '*contemporaneously*' with invocation of Board facilities, the unfair practice against which they are invoked obviously must have occurred earlier . . ." (All but first emphasis by the Court.)

The United States Court of Appeals for the First Circuit said in *National Labor Relations Board v. Clark Shoe Co.* (1951), 189 F.(2d) 731 at 732:

"The case of National Labor Relations Board v. Highland Park Mfg. Co., 71 S.Ct. 758, 760, answers quite completely . . . the contentions of the petitioner in this case . . . that 'subsequent compliance of the C.I.O. has cured any defect which may have originally

inhered in the union's capacity to *invoke the Board's aid.*' "[10] (Emphasis added.)

The repeated use of the word "invoke" (Webster's New International Dictionary (2d unabr. ed., 1948): "To call on for aid or protection . . . To appeal to for support.") in the foregoing quotations clearly indicates that the inhibitions of Sections 9(f) (g) and (h) of the Act relate to the filing of the charge, and thus make unavailable to a noncomplying union all of the processes of the Board and not merely the issuance of a complaint.

The entertaining and investigating of a charge and deciding whether to issue a complaint thereon are as much a part of the Board's processes as the issuance of the complaint and proceedings pursuant thereto. The Board itself took the position in the case of *N.L.R.B. v. Wiltse* (6th Cir., 1951), 188 F.(2d) 917, 926, that a charge is a part of the "process . . . of the Board" within the meaning of the Act, and the Court of Appeals agreed with that view.[11] Further, the United States Court of Appeals for the Sixth Circuit

[10]See *National Labor Relations Board v. Alside* (6th Cir., 1951), 192 F.(2d) 678, involving noncompliance at the time of the issuance of the complaint, as well as at the time of filing the charge, but indicating that the invalidity of the proceedings stemmed from the no compliance at the time the charge was filed. See also *National Labor Relations Board v. Red Rock Company* (5th Cir., 1951), 187 F.(2d) 76, 78.

[11]It is also significant to observe that the filing of a valid charge serves to toll the running of the six-month limitation period of Section 10(b) of the Act and thus preserves to the charging union the prospect of future operation of the further processes of the Board which would otherwise be lost absent the filing of a charge within the limitation period. To conclude that this result may flow from the filing of a charge by a noncomplying union would further repudiate the clear policy of the Act to deny the processes of the Board to noncomplying unions.

said in the case of *National Labor Relations Board v. Tennessee Egg Company*, October 17, 1952, Case No. 11465:

> "Subsections (f), (g) and (h) of Section 159, Title 29, U.S.C.A., *forbid investigation by the Board* in any matter where there has been a failure by the complaining union to file its constitution, by-laws and required reports and affidavits showing that its officers are free from communistic party affiliation or belief." (Emphasis added.)

Nor may it be contended that the effectuation of compliance subsequent to the filing of a charge can operate retroactively to give validity to the charge. In the *Highland Park, Postex, Clark Shoe* and *Alside* cases noted above, the decisions were all handed down after the C.I.O., with which the various charging unions were affiliated, had come into compliance on December 22, 1949, yet none of these courts considered the current compliance status of the charging union as significant. As this Court said in the *Highland Park* case, supra, page 4, at 325:

> "While the C.I.O. officers have since filed the affidavits, they were not on file at any time relevant to this proceeding."

In the case of *National Labor Relations Board v. J. I. Case Company* (8th Cir., 1951), 189 F.(2d) 589, the union was out of compliance both when it filed the charge and when the complaint was issued. The Court of Appeals, however, felt that the union's status at the time of issuance of the complaint was so unimportant that it made no mention of it in its opinion, adverting only to the fact of noncompliance at the time the charge was filed. The Court denied enforcement of the Board's order as against

the latter's contention that compliance prior to issuance of the Board order had cured any defects inherent in the proceedings, quoting with approval at page 601 the Board's own comments in the matter of *Isaac Andrews, et al.*, 87 N.L.R.B. 379, as follows:

> "Nor do we believe that the Union's subsequent compliance cured the effects of its non-compliance which existed at the time of its request to bargain. *The Act does not state, nor may it be implied, that the Board should give retroactive effect to the Union's compliance.* Such an interpretation would permit the circumvention of these provisions, for a non-complying labor organization could compel recognition by the mere threat of subsequent compliance and the filing of a charge. Moreover, we would be giving the non-complying union the very remedy which Congress specifically denied it." (Emphasis added.)

The United States Court of Appeals for the Sixth Circuit recently held in the *Tennessee Egg Company* case, supra, page 24, that a refusal to bargain with a union not in compliance with the filing requirements of the Act did not constitute an unfair labor practice where the union subsequently came into compliance and filed an unfair labor practice charge, for to give such retroactive effect to compliance would be to vitiate the policy of the Act, as described above. The Court thus adopted the position which the Board had taken initially in the *Isaac Andrews* case. In discussing the majority opinion in the *Douds* case, supra, page 19, the Court of Appeals said:

> "From our reading of the opinion in entirety, we infer that the highest court considered compliance by a union with Section 9(h) to obtain the benefits granted by the Act to be a necessity; and that the requirement

> of compliance should be strictly enforced to prevent the continuing danger of disruptive strikes instigated by Communists holding positions of union leadership. It may be that we are overindulgent in inferences; but, nonetheless, we do infer from the opinion of the Chief Justice that *the filing of the non-Communist affidavits at the time a charge is filed before the Board should not properly be construed to have retroactive effect.* We gather this from the strong expressions of the Chief Justice in condemnation of communism. This court, both individually and collectively, holds a like point of view." (Emphasis added.)

It is submitted that the same considerations preclude giving to the ultimate compliance of the C.I.O. any retroactive effect to validate a noncomplying charge.

As against the foregoing body of authority, it is significant to note that there is not a single judicial decision which supports directly or by proper inference the position herein asserted by the Board. It is submitted, therefore, that the courts have consistently recognized that compliance is a prerequisite to the filing of a valid charge.

e. Analysis of the Board's Arguments.

In its brief in support of the petition for certiorari granted herein by this Court, the Board has put forward certain arguments which it asserts establish that a charge may be filed by a noncomplying union. These amici curiae believe that the matters set forth above completely refute these arguments. Analysis of each of the Board's arguments, furthermore, independently demonstrates how extremely tenuous the Board's position is.

(1) LANGUAGE OF THE ACT.

In analyzing the language of the Act, the Board has asserted that a comparison of the provision of Section 9(h) that "no complaint shall be issued" where the charging union is not in compliance with the affidavit requirement of 9(h), with the provisions of Section 9(h) that "no investigation shall be made" in representation cases and "no petition . . . shall be entertained" in union shop authorization cases[12] supports the conclusion that Congress did not preclude the General Counsel from receiving and investigating unfair labor practice charges filed by noncomplying unions.

It is submitted that this analysis is not tenable, for it is wholly repudiated by the legislative history applicable to Section 9(h), supra, pages 11-14, which conclusively proves a Congressional intent exactly contrary to that which the Board now seeks to establish. Furthermore, the phrase, "no complaint shall be issued," as used in Section 9(h) can only be construed as meaning that, within the meaning of the Act, a charge filed by a noncomplying union has no operative effect whatsoever. In the same sense, Congress provided in Section 10(b) of the Act that when unfair labor practice proceedings are barred by the six-months limitation period "no complaint shall issue." It would be a sad criterion of the administrative practices under the Act and a deplorable example of wastage of time, expense and effort if the Board were to contend, by a parity of reasoning, that a charge made after the elapse of the six-months limitation

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[12]Subsequent to the Board's decision below, the provisions for holding union shop elections were eliminated from the Act, and, in conformity therewith, the reference to union shop petitions was deleted from Section 9(h). Public Law 189, 82 Cong., 1st Sess., approved October 22, 1951.

period could be received and investigated even though no complaint could be issued on the basis thereof. To the same extent that the statutory prohibition against issuing a complaint barred by limitation surely does not sanction the processing of an invalid charge belatedly filed, so must the statutory prohibition against issuing a complaint at the instance of a noncomplying union be construed as not sanctioning the processing of an invalid charge filed by a noncomplying union.

The prohibitory phrases of Sections 9(f) (g) and (h) refer respectively in each instance to the following Sections of the Act:

> "9(c) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice."
>
> "9(e)(1) Upon the filing with the Board by a labor organization . . . of a petition alleging that 30 per centum of the employees . . . desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment . . . the Board shall . . . take a secret ballot, etc."
>
> "10(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, etc."

Taking Section 9(h) as an example, a comparison of the prohibitory phrases thereof with the Sections to which each phrase refers demonstrates that the prohibition in each instance is directed against the first affirmative act mentioned in the Section to which it relates that is subject to control by the Board—making an investigation, 9(c); entertaining a petition, 9(e)(1); and issuing a complaint, 10(b). It is to be noted that in authorizing the Board to issue a complaint "whenever it is charged that any person has engaged in or is engaging in" an unfair labor practice, Section 10(b) adverts to the making of a charge which, in the general sense indicated by the context of this Section, is not an act that is actually under the control of the Board. It is only reasonable to conclude that, recognizing this, the draftsman, in drafting the portions of Section 9(h) relative to unfair labor practices, followed the pattern established by his treatment of 9(c) and 9(e)(1) and prohibited the first affirmative act placed by said language under the control of the Board, that is, the issuance of the complaint. The interpretation of the language to which the Board calls attention is thus entirely consistent with that here contended for by these amici curiae and which every other relevant consideration has shown to be proper.

(2) INACTION OF CONGRESS IN AMENDING ACT.

The Board, substantially ignoring the conclusive pre-enactment history of the Act outlined above, further contends that the failure of Congress to enact an amendment expressly prohibiting the Board from entertaining charges filed by noncomplying unions operated (so these amici curiae presume for want of a more definite indication of the contention in the Board's brief in support of its petition for the

writ of certiorari granted herein) as an authorization to the Board to entertain such charges. The Board calls attention to the fact that General Counsel Denham in June, 1948, recommended that the Act be amended to provide expressly that charges could not be entertained unless prior compliance with the filing requirements had been effected, and that the Congressional Joint Committee on Labor-Management Relations recommended that the suggested amendment be adopted. The Board then asserts that, when Congress subsequently amended Section 9(h) of the Act by enacting Public Law 189, 82 Cong., 1st Sess. (hereinafter referred to as the "Taft-Humphrey Act"), it did not adopt the amendment so suggested. From this the Board apparently believes it should be concluded that Congress adopted the Board's construction of the statutory Section in question.

It is submitted that the report of the Joint Committee on Labor-Management Relations is not entitled to any consideration in that connection. These amici curiae have found no evidence of any Congressional consideration of the Committee's proposal and believe that no inferences as to Congressional intent can, under the circumstances, be drawn from the inaction of Congress. Actually, the inaction of Congress may be more logically and reasonably explained by the fact that there was no need for such legislation, because it was already clearly established by the legislative history attending the extensive consideration of the Taft-Hartley Act that it was the Congressional intent that compliance be a prerequisite to the filing of a charge,[13] and the Board's regulations, then in effect, also required that charging unions be in compliance.[14]

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[13]Supra, pages 11-14.

[14]Supra, pages 14-17.

It may be that it is the Board's contention that Congress' failure to amend the Act, as recommended by the Joint Committee, constituted an adoption by Congress of the Board's decisions in the matter of *Southern Fruit Distributors*, 80 N.L.R.B. 1283, and in the matter of *H & H Manufacturing Co. Inc.*, 87 N.L.R.B. 1873, holding that Section 9(h) of the Act requires compliance at the time of issuance of the complaint, rather than at the time of filing the charge. In the first place, the decisions in these cases were, at the time they were handed down, clearly at variance with every relevant consideration, including the legislative history of the Act, the Board's own rules of procedure and the General Counsel's administrative practices thereunder. Furthermore, nothing set forth in these decisions, which do nothing more than express conclusions, suggests that the Board gave any attention to these considerations. The weakness underlying the Board's contention may be further illustrated by an analogy. For approximately four years prior to this Court's decision in the *Highland Park* case, the erroneous determination of the Board in the case of *Northern Virginia Broadcasters, Inc.*, supra, page 17, relative to the necessity of compliance by the C.I.O., was outstanding. Certainly the fact that Congress did not, during this four-year period, enact a law reversing this erroneous Board holding was not binding on this Court in the ultimate resolution of that question. Similarly, the inaction of Congress as to amending the Act with reference to the filing of charges by noncomplying unions is of no moment in the resolution of the issues presented herein.

It is not necessary, however, to speculate as to whether the Taft-Humphrey Act was intended to support the inter-

pretation now urged by the Board. Not only was the proposed bill neither based on nor related in any way to the recommendation of the Joint Committee on Labor-Management Relations[15] adverted to by the Board, but it is irrefutably established that the joint authors of the bill intentionally avoided making any provision therein relative to the question of whether the charges originally filed by C.I.O. affiliates during the period of noncompliance should be deemed valid and capable of supporting new complaints issued after compliance. On August 21, 1951, in the course of Senatorial debate, Senator Nixon stated that he had advised his constituents that the proposed bill would have no effect whatever on cases which had been dismissed for noncompliance pursuant to the *Highland Park* decision. He asked whether Senator Humphrey, one of the co-authors of the bill, agreed with him and Senator Humphrey stated he did (97 Cong. Rec. 10675).

Further, Senate Report No. 646, supra, note 15, relative to the bill, which is repeated in substance in House Report No. 1082, id., specifically states that the bill was not intended to have any effect on the validity of such new complaints, as follows;

> "It is not intended that this bill, in itself, shall create any authority to reinstitute any unfair labor practice proceeding which has heretofore been dismissed by the courts or by the National Labor Relations Board, on the authority of the Highland Park case."

It is obvious, therefore, that the enactment of the Taft-Humphrey bill, without inclusion of an amendment specifi-

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[15]See Senate Report No. 646 and House Report No. 1082, 82 Cong., 1st Sess.

cally precluding the entertaining of charges filed by non-complying unions, cannot be considered as evidence of Congressional intent to adopt the construction of the Act here asserted by the Board.

It is also significant that this contention of the Board was evaluated by the United States Court of Appeals for the Third Circuit in the *Nina Dye Works* case, supra, page 2, at page 363, note 1, as follows:

> "The above subsections were later amended, 65 Stat. 601, 29 U.S.C.A. § 159(f), (g), and (h). While the Board suggests certain inferences from this, we do not think that the point merits discussion."

It is clear, therefore, that this contention of the Board is insupportable.

These amici curiae submit, therefore, that the clear requirement of Sections 9(f), (g) and (h) of the Act is that compliance therewith be effected prior to the filing of a charge. This conclusion is established by every relevant consideration—the language of Sections 9(f), (g) and (h), the intent of Congress when it enacted those Sections, the procedures followed by the Board thereunder, and the applicable judicial decisions. Since the charge which initiated this proceeding was therefore invalid, and since the filing of a valid charge is a condition precedent to the issuance of a complaint, it is respectfully submitted that the decision of the Court of Appeals, setting aside the order of the Board which was predicated upon the invalid complaint, should be affirmed.

B. The Board Exceeded Its Jurisdiction in Entertaining the Charge and Issuing the Complaint and Order Because Such Acts Were Prohibited by the Administrative Procedure Act.[16]

Reference has previously been made herein to the sections of the Board's Rules and Regulations, and Statements of Procedure under which unions have, from the inception of the Act, been required to come into compliance with Sections 9(f), (g) and (h) as a prerequisite to filing unfair labor practice charges.[17] In promulgating these Statements and Rules and Regulations the Board was and is subject to the procedural requirements of the Administrative Procedure Act,[18] Section 3(a) of which provides, in part, as follows:

> "Every agency shall separately state and currently publish in the Federal Register . . . (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations . . . *No person shall in any manner be required to resort to organization or procedure not so published.*" (Emphasis added.) 5 U.S.C. § 1002(a)

These amici curiae contend that since the Board instituted proceedings against the Respondent in direct violation of its only published procedures, it acted entirely without jurisdiction and the complaint and order issued herein are invalid.

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[16]Supra, page 7.

[17]Supra, page 14-15.

[18]Section 6 of the Act.

It has been said that Section 3 of the Administrative Procedure Act

> "continues the requirement of the Federal Register Act as to the publication of substantive rules *and in addition requires agencies to publish in the form of rules their organization and procedures.*" (Emphasis added.) Reich, Administrative Procedure Act: Analysis of its requirement as to rule-making, 33 A.B.A.J. 315 at 316 (1947).

The requirement that compliance be effected before a charge may be filed is clearly a "rule" of "procedure" as defined in Section 2 of the Administrative Procedure Act. 5 U.S.C. § 1001(c). Ginane, The Administrative Procedure Act, 95 Pa. L. Rev. 621, 622-627 (1947); Davis, Administrative Rules—Interpretative, Legislative and Retroactive, 57 Yale L. J. 919 (1948); *Willapoint Oysters, Inc. v. Ewing* (9th Cir., 1949), 174 F.(2d) 676, 686-7.

The clear effect of Section 3 is to establish the publication requirement as a condition precedent to the utilization by an administrative agency of procedures subject to that requirement. 60 Harv. L. Rev. 1339 (1947); see also 34 Geo. L. J. 457, 458 (1946). Cf. *United States v. Morton Salt Company* (1950), 338 U.S. 632, 642-646. The only rules of procedure thus established by the Board in compliance with the Administrative Procedure Act are those set forth in the Rules and Regulations and Statements of Procedure noted above, under which compliance by a charging union with Sections 9(f), (g) and (h) of the Act is required at the time the charge is filed or within ten days thereafter.[19] The

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[19] See Note 5, supra, page 15.

General Counsel's failure to dismiss the invalid charge filed herein by the noncomplying Union and the Board's refusal to dismiss the complaint issued pursuant to the invalid charge are tantamount to an abrogation of the Board's governing rules of procedure without complying with the terms of the Administrative Procedure Act. This the Board may not do. Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009(e), in defining the scope of judicial review of the action of an administrative agency, specifically provides that the reviewing court

> "... shall ... hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; ... (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law ..."

It is submitted, therefore, that in subjecting the Respondent to a procedure different than and contrary to the rules of procedure established by it pursuant to Section 3 of the Administrative Procedure Act the Board has violated that Act, thus exceeding its jurisdiction, and, as a consequence, the complaint and order issued against the Respondent pursuant to the charge filed by the noncomplying Union were invalid.

C. The Board Exceeded Its Jurisdiction in Entertaining the Charge and Issuing the Complaint and Order Because Such Acts Constituted an Arbitrary Discrimination Against the Respondent in Violation of the Fifth Amendment of the United States Constitution.

Even if it be assumed *arguendo* that the Act does not preclude the filing of charges by noncomplying unions, it is

clear that the Board has itself established such a requirement.[20] From the inception of the Act, the Board, pursuant to its procedural mandates, has required unions to be in compliance when filing charges and charges filed by noncomplying unions have been dismissed by the General Counsel in accordance with procedures thus established.[21] As a corollary to this procedure, after such dismissal the limitation period of Section 10(b) of the Act has continued to run, and, at the expiration of six months after the occurrence of the acts complained of, the union's rights before the Board have been lost, absent the effectuation of compliance and the filing of a new charge prior thereto.

In the present case the charging Union was not in compliance when it filed the charge on August 3, 1949, and had not been in compliance at any time after August 22, 1947, the effective date of the Act, by reason of its affiliation with the C.I.O. The C.I.O. did not come into compliance until December 22, 1949.

Applying the Board's established procedure to these facts, the charge should have been dismissed not later than ten days after filing, following which the six-month limitation would have expired. Instead, the General Counsel entertained the charge and on March 27, 1950, issued a complaint. Since the General Counsel has consistently dismissed charges filed by noncomplying unions, and since the charging Union herein was not in compliance at the time the charge was filed, the Respondent was thus subjected to the processes of the Board under circumstances identical to those in which other respondents have been free from

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[20]Supra, pages 14-17.

[21]Note 7, supra, page 16.

those processes. If this procedure were sustained, a corollary consequence of the General Counsel's failure to dismiss the charge against the Respondent would be that the Respondent would be deprived of the protection of the six-month limitation of Section 10(b) of the Act where other respondents similarly situated have enjoyed that protection. It is submitted that there is no justifiable basis for applying special procedures to the Respondent, which were not applied to others, and that the issuance of the complaint was therefore discriminatory and invalid and constitutes a denial to the Respondent of the protection assured to it under the Fifth Amendment of the Constitution of the United States:

> "No person . . ., shall be . . . deprived of . . . property, without due process of law . . ."

There can be no doubt that discrimination in the administration of an otherwise valid statute is as reprehensible under the Constitution as discrimination inherent in an act of legislation itself. *Rogers v. Alabama* (1904), 192 U.S. 226; *East Coast Lumber Terminal v. Babylon* (2nd Cir., 1949), 174 F.(2d) 106; *Senior Citizens League, Inc. v. Department of Social Security of Washington* (Wash., 1951), 228 P.(2d) 478; see also Tussman and tenBroek, *Equal Protection of the Laws*, 37 Cal. L. Rev. 341, 353 (1949).

It is clear from the authorities that to avoid the proscription of discrimination a classification must include all who are similarly situated with respect to the purpose of the law in question. *Connolly v. Union Sewer Pipe Company* (1902), 184 U.S. 540; *Brinkerhoff-Faris Trust and Savings Company v. Hill* (1930), 281 U.S. 673. Cooley, *Constitutional Limitations* (8th ed., 1927), V. 2, pp. 824-825; 37 Cal. L. Rev. 341, supra. It is fundamental from this that

impediments interposed by the government to the pursuits of anyone are within the constitutional proscription against discrimination unless equally applied to the pursuits of all under like circumstances. *Barbier v. Connolly* (1884), 113 U.S. 27. Therefore, it is obvious that the discriminatory action of the General Counsel in entertaining a charge against the Respondent by the noncomplying Union, while dismissing charges filed against other respondents by other noncomplying unions, resulted in a violation of the applicable provisions of the Constitution.[22]

If it be contended that discrimination is proscribed only by the Equal Protection clause of the Fourteenth Amendment, and not by the Due Process clause of the Fifth Amendment, it is submitted that the authorities have recognized that the basic principles of equal protection are inherent in the concept of due process. In *Steward Machine Company v. Davis* (1937), 301 U.S. 548 at 585, Mr. Justice Cardozo, in sustaining the validity of the Federal Social Security Act tax, said that the

> ". . . act of Congress is therefore valid, so far at least as its system of exemptions is concerned, and this though we assume that *discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment.*" (Emphasis added.)

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[22]See, for example, *Mitchell v. State* (Fla., 1946), 25 So.(2) 73, where the Court stated: "This right of equal protection may not be taken away by the State choosing to proceed with the prosecution by some method which will deprive the [accused] of the benefit of the statute of limitation while others guilty of the like offense may have the benefit of the statute of limitation because the State has chosen to proceed with the prosecution by a different method."

This concept was reiterated in *Washington National Insurance Company v. Board of Review* (N.J., 1949), 64 A. (2d) 443, where the court said:

> "While the due process and equal protection guarantees are not coterminous in their spheres of protection, equality of right is fundamental in both."

And in *United States v. Yount* (W.D. Pa., 1920), 267 F. 861, the District Court said:

> "It seems reasonably clear that the 'due process of law' provision of the Fifth Amendment is broad enough in its scope and purpose to include the 'equal protection of the laws', which no state may deny to any person under the provisions of the Fourteenth Amendment."[23]

It is submitted, therefore, that the discriminatory treatment present in this case, founded on no discernible semblance of distinction between this and any other respondent and directed at the achievement of no purpose of the Act, is a denial of due process within the meaning of the Fifth Amendment and is invalid.

The Board may assert that a basis for the discriminatory treatment accorded to the Respondent exists in that noncompliance of the charging Union resulted only from the noncompliance of the C.I.O., with which the charging Union was affiliated, and that, since the Board did not at the time the charge was filed consider the C.I.O. to be a "national or international labor organization" within the requirements of Sections 9(f), (g) and (h) of the Act, such a case

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[23]See Antieau, *Equal Protection Outside the Clause*, 40 Cal. L. Rev. 362, 362-366 (1952).

should now be considered distinct from all others. It is submitted that this argument falls by itself. This Court has specifically held that the C.I.O. is a "national or international labor organization" within the meaning of the filing requirements. *National Labor Relations Board v. Highland Park Mfg. Co.*, supra, page 4. The Act does not distinguish between various states of noncompliance, whether resulting from the failure of the local itself, an international of which it may be a constituent unit, or a labor organization, such as the C.I.O., of which it may be an affiliate. The disabling consequences are identical.

The foregoing compels the conclusion that, in entertaining the charge filed by the noncomplying Union and issuing the complaint and order based thereon, the Board exceeded its jurisdiction by subjecting the Respondent to an unconstitutional discrimination and that the Board's order was invalid and was properly set aside by the Court of Appeals.

VI. CONCLUSION

In view of the considerations dealt with above, the entertaining of the charge filed by the noncomplying Union was improper under the express provisions of the Act and of the Administrative Procedure Act and constituted a discrimination against the Respondent under the United States Constitution. The subsequent compliance of the C.I.O. did not serve to validate the charge retroactively, and, accordingly, the complaint and order issued by the Board on the basis thereof were a nullity. Therefore, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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(Appendix follows)

APPENDIX

The pertinent provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. (Supp. III) § 141, et seq., are as follows:

Section 6.

The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

* * * * * * *

Section 9.

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board:

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the

purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

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(e)(1) Upon the filing with the Board by a labor organization which is the representative of employees as provided in section 9(a), of a petition alleging that 30 per centum of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

* * * * * * * * *

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall

have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing:

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws, showing the procedure followed with respect to (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k)

participation in insurance or other benefit plans, and (I) expulsion of members and the grounds therefor; and (B) can show that prior thereto it has:

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f)(A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f)(B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9(e)(1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in and is not a member of or support any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

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Section 10. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and ~~cause to be~~ served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the

serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).